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No. 09-1484

Supreme Court, U.S.
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In the Supreme Court of the United States

EARL JORDAN,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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Petitioner Earl Jordan submits this reply to the Brief for the United States in Opposition.

The Brief for the United States in Opposition ("Brief") is most notable for its reluctance to acknowledge that the present case involves an appeal from the granting of a motion for summary judgment in favor of the United States, on behalf of the Internal Revenue Service. Much of the Respondent's Brief reads as if the present case involved an appeal from a trial in which the trial court, after weighing conflicting evidence, found that Petitioner was a "responsible person." Thus, at page 4, the Brief notes that the district court discussed the various non-exclusive factors used by the Ninth Circuit to determine whether a person is a "responsible person" for purposes of 26 U.S.C. §6672. The Brief then states that the district court, "[a]pplying that multi-factor analysis to the circumstances of this case," concluded that Petitioner was a responsible person. Brief at pp. 4-5. While Respondent may want this Court to believe that there was a trial after which the district court concluded that Petitioner was a "responsible person," this is not what happened.

The district court in the present case granted the summary judgment motion filed by the Respondent over the opposition of Petitioner. Under this Court's decision in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), which the Respondent fails to cite or discuss anywhere in its Brief, the district court was required to view in the light most favorable to Petitioner the evidence offered by Petitioner on the

issue of whether Petitioner was a "responsible person." The district court could properly grant the Respondent's summary judgment motion only if Petitioner's evidence was insufficient as a matter of law to raise a genuine issue of material fact on the question of whether Petitioner was a "responsible person."

Thus, if the evidence offered by Petitioner in opposition to the United States' summary judgment motion was sufficient to create a triable issue of fact on the question of whether Petitioner had the power and authority to pay the taxes in question, *see O'Connor v. United States*, 956 F.2d 48 (4th Cir. 1992), the granting of summary judgment in favor of the United States was improper. *Id.*

The evidence offered by Petitioner in opposition to the summary judgment motion filed by the United States included testimony and documents which showed the following:

> – During the quarters in which the unpaid employment taxes accrued (the third and fourth quarters of 1999) and subsequently, the bank account maintained by the company were located in California, where Andrew Pollett was located, not in Illinois where the business and the Petitioner were located. Declaration of Earl Jordan ("Jordan Decla.") at ¶¶ 26, 27, App. at p. 47a; Declaration of Lisa Wutka ("Wutka Decla.") at ¶¶6, 15, App. at pp. 63a, 66a.

– From the summer of 1998 until the third quarter of 2000, Andrew Pollett raised from investors nearly all of the funds deposited into the company's bank account. Jordan Decla. ¶¶ 17, 19 – 20, 27, 29, 44, 45, App. at pp. 42a – 44a, 47a, 48a, 54a; Wutka Decla. ¶¶ 4 – 6, App. at p. 63a.

– From the summer of 1998 until the third quarter of 2000, Andrew Pollett determined the amounts that would be deposited into the company's bank account. Jordan Decla. ¶ 27, App. at p. 47a; Wutka Decla. ¶¶ 8, 13 – 14; App. at pp. 64a, 65a – 66a.

– From the summer of 1998 until the third quarter of 2000, Andrew Pollett exclusively controlled the finances of the company. Jordan Decla. ¶20, App. at pp. 43a – 44a; Wutka Decla. ¶¶5, 23, App. at p. 63a, 69a.

– From the summer of 1998 until the third quarter of 2000, Andrew Pollett alone arranged for financing for the corporation. Jordan Decla. ¶¶ 20, 44, 45, App. at pp. 43a – 44a, 54a; Wutka Decla. ¶5, App. at p. 63a.

– From the summer of 1998 until the third quarter of 2000, Andrew Pollett had exclusive authority to decide which bills of the company to pay. Jordan Decla. ¶¶ 20, 37, 38, App. at pp. 43a – 44a, 51a – 52a; Wutka Decla. ¶¶ 5 – 9, 15, 16, 22, 23, App. at 63a – 64a, 66a, 68a – 69a.

– As of the beginning of the third quarter of 1999, Mr. Jordan did not own more than 15% of the company's outstanding stock. During all times relevant, Mr. Pollett's investor group held most of the remaining stock and Mr. Pollett controlled the company's Board of Directors. Jordan Decla. ¶¶ 18, 21, App. at 43a, 44a.

– Prior to November of 1999, all checks written on the company's checking account were physically sent from the company's premises in Illinois to Mr. Pollett in California for approval. Checks which were approved by Mr. Pollett were sent back to Illinois but were not sent out until Mr. Pollett's assistant advised the company's controller that sufficient funds had been deposited to the company's bank account to cover the checks. Jordan Decla. ¶20, App. at pp. 43a – 44a; Wutka Decla. ¶¶ 7 – 9, App. at pp. 63a – 64a.

– In November of 1999, when Petitioner first learned about the existence of the unpaid employment tax liabilities, Pollett established a new corporate bank account at Imperial Bank in California. Pollett had exclusive control over the check book for this account. Pollett also had exclusive authority to make wire transfers out of this account. Jordan Decla. ¶¶ 27, 31, App. at pp. 47a, 49a, 51a; Wutka Decla. ¶¶ 15 – 16, 22, App. at pp. 66a – 67a, 68a.

– Starting in the third quarter of 1999, Andrew Pollett would only provide sufficient funds to pay the "net payroll" of the company, *i.e.*, he did not provide sufficient funds to pay the company's payroll taxes. Pollett advised the company controller that the company would only be paying vendors, suppliers and net payroll for the time being, but that the payroll taxes would be paid when additional funding came in. Prior to this date, the company had always paid its payroll taxes on a timely basis. Wutka Decla. ¶ 13, App. at p. 65a.

– While the company was accruing a large employment tax liability, Mr. Pollett caused over $1.3 million to be paid to himself and his law firm from the Imperial Bank account. Jordan Decla. ¶¶ 34, 35, App. at p. 50a; Wutka Decla. ¶¶ 19, 20, App. at pp. 67a – 68a.

Essentially, the district court held that the facts set forth above, which it was required to accept as true for purpose of ruling on the summary judgment motion, *see Anderson v. Liberty Lobby, Inc.*, *supra*, 477 U.S. at 249 – 255 , were insufficient to create a genuine issue of material fact on the question of whether Petitioner had the ability to control the funds of the company during the relevant time period. The Ninth Circuit concurred with the district court's ruling.

The Respondent's Brief, when describing the ruling of the Ninth Circuit, ignores the fact that Ninth Circuit was required to determine whether, as a

matter of law, the evidence offered by Petitioner in response to the government's summary judgment motion was sufficient to create a genuine issue of material fact on the question of whether Petitioner was a "responsible person." Thus, the Brief incorrectly describes the ruling of the Ninth Circuit as a "factbound conclusion." Brief at p. 7. That is an obvious mischaracterization of the Ninth Circuit's holding. The Ninth Circuit, like the district court, essentially held that the evidence submitted by Petitioner in response to the government's summary judgment motion was insufficient as a matter of law to raise a genuine issue of material fact on the question of whether Petitioner was a "responsible person" for purposes of 26 U.S.C. §6672.

The fact that the district court and the Ninth Circuit did not follow this Court's teachings in *Anderson v. Liberty Lobby, Inc.*, *supra*, and *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), namely, that summary judgment should not be granted if there is a genuine issue as to any material fact, is highlighted by the statement in the Brief that "Petitioner disputes that [*i.e.*, the Ninth Circuit's] assessment of the evidence...." Brief at p. 10. Neither the district court nor the Ninth Circuit were supposed to weigh the evidence in the context of a summary judgment motion. Their sole function was to determine whether there was "sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, *supra*, 477 U.S. at 249. Both courts below failed to fulfill their function.

The Brief's failure to acknowledge that the legal standard set forth in *Anderson v. Liberty Lobby, Inc.*, *supra*, is the test that should have been applied by the courts below highlights the weakness of the government's position in opposing Petitioner's request for a writ of certiorari.

The Brief at pp.7–8 incorrectly claims that there is no split among the courts of appeal on the question of when, as a matter of law, a party has presented sufficient evidence to raise a genuine issue of material fact about whether a person is a "responsible person" for purposes of 26 U.S.C. §6672. The Petition for Certiorari explains the split in the Circuit Courts of Appeal on this issue in great detail at pp. 14 – 36.

Recognizing a split in the circuits, the Tenth Circuit, in *Bradshaw v. United States*, 83 F.3d 1175, 1178 (10th Cir. 1995), *cert. denied* 519 U.S. 928 (1996), quoted from Judge Trott's dissent in *Alsheskie v. United States*, 31 F.3d 837 (9th Cir. 1994), in which Judge Trott stated that the majority opinion in *Alsheskie* "run[s] counter to the ... law of this and other circuits." The Tenth Circuit then stated:

> We believe the dissent in *Alsheskie* is the more persuasive view.

83 F.3d at 1181-82.

Clearly, there is a conflict in the Circuit Courts of Appeal. The present case squarely presents this

Court with an opportunity to resolve this conflict on the question of what evidence is required to raise a genuine issue of material fact on the issue of whether an individual is a responsible person for purposes of 26 U.S.C. §6672. The failure of Respondent's Brief to discuss in any meaningful fashion the real issue presented in this case, *i.e.*, whether Petitioner offered sufficient evidence to create a triable issue of fact on the issue of whether he was a "responsible person" for purposes of 26 U.S.C. §6672, is most telling. The petition for writ of certiorari should be granted.

Respectfully submitted,

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